Supreme Court of the United States

October Term, 1939

No. 18

City of Owensboro,

Appellant,

v.

Owensboro Water Works Company, of Owensboro, Ky.,

Appellee.

BRIEF FOR APPELLEE

William T. Ellis,

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Of Counsel.

(6)

Supreme Court of the United States

OCTOBER TERM, 1903

No. 58

City of Owensboro, ... *Appellant*

v.

Owensboro Water Works Company, of Owensboro, Ky., ... *Appellee*

BRIEF FOR APPELLEE

MAY IT PLEASE YOUR HONORS:

Under rule 21, adopted by this court, appellee is not required to make a statement of its case, unless the statement of appellant is controverted. Supposing appellant will make substantially the same statement of its case here it made in the circuit court of appeals, where this suit was at one time pending, and believing that statement to be inaccurate and misleading, appellee, availing itself of the right given by the rule *supra*, submits the following which it believes to be a fairly accurate statement of the case which Your Honors are asked now to review.

I.

STATEMENT.

The common council of Owensboro, on the nineteenth day of March, 1900, passed an ordinance entitled "An ordinance to fix and regulate water rates, prices and charges for water furnished consumers in the City of Owensboro, and for other purposes." (Record, pages 31-35.)

1. The ordinance fixes the prices at which water should be furnished to private consumers for domestic and other purposes.

2. That consumers, in lieu of the rates fixed in the ordinance, may require persons, firms or corporations to attach a water meter to the pipe leading into the premises and that thereafter the consumer shall pay for the water furnished the minimum rate as shown by such ordinance fixing meter rates, etc. The same section provides that the person, firm or corporation furnishing water shall not, in any case, attach a meter unless the consumer demands it, except as the mayor of the city, after hearing the evidence, may so order.

3. The ordinance provides that persons, firms or corporations furnishing water shall not collect the water rates fixed therein or any part thereof in advance, except as the consumer may choose voluntarily to pay same.

4. It is further provided that each person, firm or corporation furnishing water shall keep an exact, complete and true account of all its incomes, gains and receipts from every source

whatever, and a complete and true account of all its expenditures, showing date of each and every item of expenditure and expense, etc., and that the books of the persons, firm or corporation so furnishing water, containing said accounts, shall be open at all times to the inspection and examination of the common council, and that a return shall be made to the common council at the end of each six months, which return shall be verified by the oath of the president, secretary and treasurer of those furnishing water, etc.

5. It is provided in section 5 that individuals, firms or corporations furnishing water shall, on written application of any person along the lines where their pipes extend, furnish water to the persons so applying within ten days thereafter.

6. The eighth and last section of the ordinance, the validity of which is questioned on this appeal, is crowded with drastic penal provisions. That section provides if any person, firm or corporation engaged in furnishing water to consumers in the City of Owensboro shall demand, charge, exact or receive directly or indirectly from any consumer as compensation or consideration for water furnished, any money, property or other thing of value over and above or in excess of the rates and prices for water herein named and prescribed, or shall fail or refuse for ten days without reasonable excuse to supply water as prescribed and required by section 7, or shall fail or refuse to keep the accounts, or the books required to be kept, or make the reports in writing to the common council, as required in the ordinance, such person, firm or corporation, so offending, shall be fined in a sum not less than $10.00, and not exceeding $50.00 for each offense.

Appellee is and was at the date of the passage of the ordin-

ance of March 19, 1900, a corporation created by and existing under the laws of the state of Kentucky. Its business was that of furnishing water to the City of Owensboro for public purposes, and to the inhabitants of said city for domestic purposes.

On the twenty-eighth day of March, 1900, appellee filed its bill in the circuit court of the United States for the district of Kentucky, seeking an injunction against the enforcement of this ordinance, or any part thereof. The grounds relied on for the injunction are fully set out in the bill. (Record, pages 3–38.)

AVERMENTS OF THE BILL.

The substance of the bill may be briefly summarized as follows:

1. The ordinance of March 9, 1900, is in violation of the contracts entered into between appellant and appellee on the third of June, 1889, as appear from resolutions, ordinances and contracts of that date.

2. In 1878 the City of Owensboro entered into a contract with the old water company, and when it renewed and extended that contract with complainant on the third day of June, 1889, the city had no power or authority under its charter in force on either of those dates to fix rates which the water company should charge private consumers, nor to prescribe the time when, or the conditions on which water rents should be paid.

3. The City of Owensboro by ordinances and contracts granted complainant's predecessor and assignor and the com-

plainant, the right to establish rules and regulations and to fix water rents to be charged private consumers and to prescribe the manner and mode of paying such rents.

Acting on the faith of these ordinances and contracts, appellee's assignor and appellee expended large sums of money in the construction and maintenance of their water works system, and had in operation in the City of Owensboro on the nineteenth day of March, 1900, an efficient system of water works of the actual cash value of $250,000, as the bill alleges.

4. Under the city's contract with appellee and under its charter it has the right to furnish water to the city for fire protection and to furnish private consumers with water throughout its entire corporate existence, which expires June 3, 1914.

It is insisted in the bill that under the ordinances passed by appellant city end under the contracts entered into between it, the appellee and its assignor, that it has the exclusive right to furnish the city with water for public purposes and to furnish the inhabitants thereof with water for domestic purposes, and that it has the right to fix rates at which it will furnish water for domestic purposes for the entire period of its corporate life, which will expire on the third day of June, 1914.

5. Appellant did not have under its previous charters, any power to fix water rates to be charged to private consumers, or to prescribe the time when, nor the manner in which the payment of such water rents should be made.

6. It is charged in the bill that the ordinance complained of is in violation of section 10, Art. 1, of the Constitution of the United States, which prohibits any state from passing any law which impairs the obligation of contracts, and that the ordinance,

if enforced, will impair the obligation of the contract between appellee and appellant city.

7. It is also charged that the ordinance is unreasonable and unjust and was passed without notice to appellee, that the rates fixed are so low that if enforced, appellee would not only be deprived of any income on its plant, but would be obliged to operate it at an actual loss, and that it would thereby be deprived of its property without compensation and without due process of law, which is in violation of section 1, Art. 14, of the amendment to the Constitution of the United States, which forbids any state to pass any law depriving any person of his life, liberty or property without due process of law, or to deny any person within its jurisdiction the equal protection of the laws.

8. It is insisted in the bill that the penal provisions of the ordinance are unreasonable, excessive and oppressive and in violation of the Constitution of the United States, and the various amendments thereto, cited in the bill.

9. The prayer of the bill is for an injunction against the city, that it be restrained from enforcing any part of the ordinance or in any manner interferring with complainant's business, and that the ordinance be adjudged void. A preliminary injunction was granted which on final hearing on all the facts was made perpetual and the City of Owensboro has brought the case here on appeal.

II.

ARGUMENT.

The merit of the objections urged by appellee against the ordinance of March 19, 1900, will appear from an examination of the various ordinances and resolutions passed by the City of Owensboro and the contracts entered into by it with the present appellee and its predecessor.

On the ninth day of September, 1878, the City of Owensboro having no water works system of its own and being, not only without adequate fire protection, but without any sufficient means of furnishing its inhabitants with water for domestic purposes, entered into a contract with a corporation known as the Owensboro Water Company, which for convenience will hereafter be referred to as "old water company," to supply the city with water for fire protection and to furnish its inhabitants with water for a period of twenty-five years. (Record pages 25–29.)

The old water company began business on the day of its organization, which was September 9, 1878. Under the resolutions, ordinances and contracts already referred to it constructed a complete system of water works in the City of Owensboro and from the date of its organization up to and including June 3, 1889, it supplied the city through its water hydrants ample fire protection and provided its inhabitants with water for domestic purposes.

The capital stock of the old water company was fixed at $80,000. The rights, privileges and powers of the old water

company and the nature of its business are accurately stated in its articles of incorporation.

Record pages 23, 24, 25.

Simultaneously with the organization of the old water company and as an inducement to it to embark so large an amount of capital in a new and untried enterprise, the City of Owensboro passed an ordinance authorizing it to occupy all the streets and alleys of the city for the purpose of laying its pipes and water mains and for maintaining and operating its system of water water works in the City of Owensboro, for the purpose of supplying the city and the inhabitants thereof with water during its corporate existence.

The ordinance recites that among the considerations for its passage were the benefits to be derived by the city and its inhabitants from the construction and operation of water works, in consideration of which certain rights, privileges and franchises were granted the old company for the full period of its corporate existence.

In addition to this, the city by an ordinance rented from the old water company fire hydrants for the term of its corporate existence and obligated itself to pay for the use of such hydrants the sum specified in the contract, and to take water from such additional hydrants as it desired at the price named in the ordinance.

Sections 9, 10 and 14 of the original ordinance confer on the old water company, among other things, the power and authority to make and enforce as a part of the conditions upon which it would supply water for domestic purposes, all needful rules and regulations. It is further stipulated in the ordinance that the

city would adopt and enforce ordinances protecting the company in the safe and unmolested exercise of the franchises granted and against fraud and imposition.

It is also provided by the ordinance that it should be regarded and treated as a binding contract upon the City of Owensboro *and that after its acceptance the ordinance should be the measure of the rights and liabilities of the city and the water company.*

Record pages 25, 26, 27 and 28.

The ordinance was accepted by the old water company on the day of its passage.

Record page 29.

On the faith of the ordinance and the contract above referred to the old company installed its water works system in the City of Owensboro and entered upon the performance of its part of the contract by furnishing the city water for fire protection and water to private consumers for domestic purposes.

It expended large sums of money in the construction, maintenance and operation of its works. The extent to which the old company expended money, the character and efficiency of the works it installed appear in this record to which specific reference will be made hereafter.

From the date of the contract between the City of Owensboro and the old water company, up to the third day of June, 1889, it maintained and operated system of works under the ordinance passed by the City of Owensboro and in virtue of the contract it had with the city.

The population of the city having grown, the demands of both the city and its inhabitants for larger supplies of water having increased, it became apparent that the then system of works

should be extended and that more capital was necessary for that purpose.

This was the joint judgment of the old water company and the common council of the City of Owensboro.

ORGANIZATION OF APPELLEE COMPANY.

About the thirtieth day of May, 1889, appellee was created a corporation under the general laws of the state of Kentucky under the corporate name of "Owensboro Water Works Company, of Owensboro, Kentucky."

The nature and extent of its business, the amount of its capital stock, the time for which it was to exist, its rights and powers and authority appear in its charter.

See record pages 23-25.

So much of appellee's articles of incorporation as are pertinent to the questions involved on this appeal are as follows:

> "Sec. 4. The general nature of the business proposed to be transacted by the said corporation is to acquire the water works *of the Owensboro Water Company*, a corporation organized and existing under the laws of the state of Kentucky, and its contract for supplying the City of Owensboro and its inhabitants with water, and to maintain and operate water works in the City of Owensboro, county of Daviess and state of Kentucky, for supplying the City of Owensboro and the inhabitants of said city and its vicinity with water for public and private purposes."

The capital stock of appellate company is fixed at $390,000. Its board of directors was given the power to increase the capital stock from time to time to an amount not exceeding $500,000.

By section 6 of appellee's articles of incorporation it is provided:

> "The time for the commencement of the said corporation is the first day of June, 1889, *and it shall terminate twenty-five years thereafter, subject to such extension of its terms of existence as may be by law provided.*"

Appellee, as appears from section 4 of its charter, proposed to purchase the old water power company and to become the assignee of its contracts, rights and franchises, but it declined to do so until it could first obtain the consent of the City of Owensboro for that purpose.

On the third day of June, 1889, appellant city, by its common council, adopted the following preamble:

> "Whereas the Owensboro Water Works Company of Owensboro, Kentucky, a corporation duly organized, and existing under the laws of the State of Kentucky, is ready to purchase the water works of the Owensboro Water Company, *together with its existing contracts for supplying the City of Owensboro and the inhabitants of said city and its vicinity with water, and whereas it is desired by the said two companies in order that the said purchase may be consummated, that the City of Owensboro grant to the said Owensboro Water Works Company of*

Owensboro, Kentucky, the franchises and license to maintain, complete and operate a water works in the City of Owensboro and to use the streets, alleys and other public highways within the city for laying, repairing and taking up mains, service pipes, hydrants and other apparatus for the supply of water, and that the City of Owensboro accept the Owensboro Water Works Company of Owensboro, Kentucky, as the successor to the contract made by the City of Owensboro with the Owensboro Water Company for hydrant rentals; NOW, in order to enable the said companies to carry out their negotiations and to vest the contracts of the Owensboro Water Company for hydrants as fully in the said Owensboro Water Works Company, of Owensboro, Kentucky, as if they had been originally made by the City of Owensboro with the said Owensboro Water Works Company, of Owensboro."

Be it ordained by the common council of the City of Owensboro:

"Sec. 1. That in consideration of the purchase by the Owensboro Water Works Company, of Owensboro, Kentucky, of the water works of the Owensboro Water Company, the franchise and license are hereby granted to the Owensboro Water Works Company, of Owensboro, Kentucky, and to its successors and assigns, for and during the existence of said corporation, to maintain, complete and operate water works in the City of Owensboro for supplying the City of Owensboro and the inhabitants of said city and its vicinity with water for public and private purposes, and to use within the present and future limits of the City of Owensboro the

streets, alleys and other public highways thereof for the purpose of laying, repairing and taking up mains, service pipes, hydrants and other apparatus for the supply of water.

But there shall be no continued unreasonable obstruction of the said streets, alleys and other public highways, and after their use, from time to time, they shall be restored by the said water works company as near as practicable to their former condition; and said grant is subject to the existing right of purchase of said water works by the said City of Owensboro.

Sec. 2. That, in like consideration of the said purchase, by the Owensboro Water Works Company, of Owensboro, Kentucky, of the water works of the Owensboro Water Company, the City of Owensboro hereby accepts the said Owensboro Water Works Company, of Owensboro, Kentucky as the successor to the contract for hydrant rental now existing between the City of Owensboro and the Owensboro Water Company, as fully as if said existing contracts had been originally made by the City of Owensboro with the said Owensboro Water Works Company of Owensboro, Kentucky, without the intervention of the said Owensboro Water Company.

Sec. 3. That the consent of the City of Owensboro is hereby given to the consummation of the said purchase of the said water works of the Owensboro Water Company by the Owensboro Water Works Company, of Owensboro, Kentucky, and upon such consummation the mayor and city clerk of the City of Owensboro are hereby authorized and instructed to seal duplicate copies of the ordinance with the seal of the City of

Owensboro, and to sign such copies as a contract between the City of Owensboro and the Owensboro Water Works Company, of Owensboro, Kentucky, and to accept the other in behalf of the City of Owensboro when signed and sealed by the said the Owensboro Water Works Company, of Owensboro, Kentucky.

Sec. 4. This ordinance shall take effect at its passage and publication.

JOE LEE, Mayor.

PHIL R. ZULAUF, Clerk."

(Record, pages 30 and 31.)

THE ORDINANCE OF JUNE 3, 1889.

By the ordinance of June 3, 1889, consent is given by the City of Owensboro that appellee may purchase the water works of the old company, together with its existing contracts for supplying the City of Owensboro and its inhabitants with water.

The City of Owensboro likewise agrees that the franchises and licenses "to maintain, complete and operate water works in the City of Owensboro and to use the streets and alleys and other public highways within said city for the purpose of laying, repairing and taking up mains, service pipes, hydrants and other apparatus for the supply of water," shall be assigned to appellee.

By this ordinance the city accepted appellee as the successor to the contract made by it with the old water company for hydrant rentals, as fully as if it had been originally made by the City of Owensboro with appellee.

In the first section of the ordinance consenting to the purchase by appellee of the old water works, it is provided as follows:

> "That in consideration of the purchase by the Owensboro Water Works Company, of Owensboro, Ky., of the water works of the Owensboro Water Company, the franchises and licenses are hereby granted to the Owensboro Water Works Company, of Owensboro, Kentucky, and to its successors and assigns, *for and during the existence of the said corporation*, to maintain, complete and operate water works in the City of Owensboro, Kentucky, for supplying the City of Owensboro and the inhabitants of said city and its vicinity with water for public and private purposes, and to use within the present and future limits of the City of Owensboro, the streets, alleys and other public highways thereof for the purpose of laying, repairing and taking up mains, service pipes, hydrants and other apparatus for the supply of water."

By section 2 it is among other things provided, in consideration of the purchase by appellee of the Owensboro Water Company, the City of Owensboro accepts it as the successor to the contract for hydrant rentals existing between the City of Owensboro and the Owensboro Water Company as fully as if such existing contracts had been originally made by the City of Owensboro with said Owensboro Water Works Co., of Owensboro, Ky., without the intervention of said Owensboro Water Company. That the city had this power and that appellee acquired the

rights of the old water company by this assignment is sustained by the following authorities: Columbia Water Power Co. v. Columbia, 5 S. C. N. S. 225; Carlyle v. Carlyle Water, Light, &c., Co., 36 Ill. App. 28; Austin v. Bartholomew, 46, C. C. A. 327; Armor Water Works Co. v. Farmers Loan & T. Co., C. C. A. 133.

(Record pages 30 and 31.)

The court will see that the present appellee not *only obtained the consent* of appellant city to purchase the water works together with its contracts and franchises, *but that appellee was granted all the rights, privileges and franchises* which had been granted to the old water company.

Moreover, under section 1 of the ordinance above referred to this grant to appellee was to it, "its successors and assigns, *for and during the existence of said corporation.* * * *"

The capital question here involves the right of the City of Owensboro, during the corporate life of appellee to fix prices or regulate rates to be charged by it to the private consumers of its water, in view of its contracts with appellee and its assignor.

In order to ascertain whether or not such right exists it will be necessary for the court to consider what rights were granted to the old company with respect to fixing the rates it would charge its private consumers for water, for whatever right it had in that respect, was assigned to appellee, which assignment was ratified by appellant. The further question here is as to what rights, privileges or franchises were granted to appellee under the ordinance of June 3, 1889.

Appellee contends it was given the right for and *during its*

entire corporate existence to maintain and operate its water works system in the City of Owensboro and to prescribe the rules, regulations and terms on which it would furnish water for private or domestic purposes.

It not only secured by the consent of the City of Owensboro, all the rights, privileges and franchises of the old water company but all the rights, privileges and franchises granted to the old company were in express terms granted to appellee and those rights were granted for the period of appellee's corporate existence.

On the faith of the ordinance and the contract entered into between appellant and appellee the latter insists it acquired the right, not only to furnish water for fire protection, but for domestic purposes, and to prescribe the terms and conditions on which it would furnish such water, to private consumers, which necessarily implies the right to fix the rates.

In ascertaining whether or not this is sound the court will consider, in addition to the contract ordinance, what power, right or authority appellant city had at the time the contract ordinance was passed, to fix water rates to private consumers, for the parties will be held to have contracted with reference to law as it then existed.

If the city had no such right, at that time, it has no such right now, unless by some provision of a subsequent charter such right *is expressly conferred* and then the question of impairing the obligation of the contract will necessarily remain for determination.

It becomes an interesting question as to what right the City of Owensboro had under its charter in 1878, or in 1889, to fix

water rates to be charged by corporations or individuals to consumers for domestic purposes.

The charter under which appellant existed at the time the original contract was made in 1878, as well as the charter under which it existed when it consented to appellee's purchase and entered into the contract with it, conferred no power or authority on the city to fix the prices at which the corporation should supply water to private consumers for domestic purposes.

If this position is sound it follows that the attempt on the part of the City of Owensboro to pass the ordinance of March 19, 1900, was a nullity and that the judgment of the circuit court enjoining it from enforcing any one of the provisions of that ordinance ought to be affirmed, though the city under a charter subsequently granted may have had such right.

But appellee will not rest its case alone upon the ground that the city at the time of making the original contract with the old company and at the time it made the contract with appellee had no power or authority to fix the price at which the water company should supply private consumers with water, but will insist that though such power may have existed in the city, still in virtue of the ordinances and contracts it could not during the existence of appellee's corporate life, legally have passed the ordinance in question.

POWER OF THE CITY TO FIX WATER RATES IN 1878.

When the City of Owensboro entered into the contract with the old water company on September 10, 1878, it was existing

under a charter approved February 16, 1866, and various amendments thereto.

Under that charter the only power the city had with respect to providing water or fixing water rates is found in the following language:

> "To make, establish and regulate public wells, cisterns, reservoirs and pumps, and to provide for the furnishing of the said city and the inhabitabts thereof with gas and water." (Record, p. 4.) (Sessions Acts, Kentucky Legislature, 1876, vol. 1, p. 551.)

We will try to show hereafter that the city at the time it made the contract with the old water company had no power under its charter to erect works of its own, or to fix the rate which any private corporation furnishing its inhabitants with water should charge them for such service.

Having contracted both with appellee and its assignor under charters which conferred no authority on the city to fix water rates, the ordinances and contracts entered into between the city, the old water company and appellee, are binding upon appellant during the entire corporate existence of appellee.

THE CHARTER OF 1882.

At the date of the organization of appellee the City of Owensboro was existing under a charter approved the eighteenth day of March, 1882, entitled "An act to create a new charter for the City of Owensboro." (Record, page 3.)

The only powers conferred on the City of Owensboro under the charter of 1882 with respect to supplying water to the inhabitants of the city is contained iu section 10, sub-section 20, which is as follows;

> "To make, establish and regulate wells, cisterns, reservoirs and pumps, and to provide for the furnishing of the city and the inhabitants thereof with water and gas."

The power to fix water rates to private consumers is exactly the same as that contained in the charter of 1876.

Nowhere in the charter of 1876, nor in the charter approved April 18, 1882, is there any power or authority conferred on the common council of the city to fix or regulate the rates which a private corporation should charge consumers for the water it might furnish them.

The power conferred in those charters is to establish and regulate wells, cisterns, reservoirs and pumps for the purpose of providing the city and inhabitants with water and gas.

But the power to furnish, or to employ an individual or corporation to furnish water does not carry with it the power to fix the rates at which water shall be furnished when the service is rendered either by an individual or a corporation. In such case and in the absence of an express contract the individual or corporation furnishing water for domestic purposes may charge whatever seems right and reasonable.

It is certain the city cannot prescribe, without the consent of the individual or corporation furnishing water, the prices to be

charged private consumers, and that is precisely the thing attempted to be done in the ordinance of March 19, 1900.

Of course the water company being a public service corporation could not charge rates which would amount to an extortion, and the consumer would have his remedy, but the fact that a private consumer may have a remedy in such a case is no argument whatever to establish the proposition that the common council of a city which has no authority under its charter, may fix the rates to be charged, as was attempted to be done in this case.

A municipal corporation can exercise the following powers and no others:

1. Those granted in express words.

2. Those necessarily or fairly implied in or incident to the powers expressly granted.

3. Those essential to the delegated object and purpose of the corporation, not simply convenient or indispensable.

> "Any fair, reasonable doubt concerning the exercise of power is resolved by the courts against the corporation and the power is denied."
>
> Dillon on Municipal Corporations, 2 ed., section 89.
>
> "A municipal corporation has no implied powers from the mere fact of its creation to engage in the business of supplying its citizens with water for pay. *It cannot do so except by virtue of express legislative authority.*"
>
> White v. Meadeville, 177 Pa., 645.
>
> "Supplying water to a town or city is not a public

function. The power of a municipality to furnish water is derived wholly by act of the legislature."
Re Long Island Water Co., 14 N. Y., Supp. 807.

In City of St. Louis v. Bell Telephone Company, 2 Lawyers Reports Annotated, 278, the question was: did the common council of the city of St. Louis have "power *to fix telephone charges?*"

Under statute law of Missouri, the city had the general power *to regulate the use of the streets, to license, tax and regulate lawyers, doctors, telephone companies, and* all other business, trades and avocations whatsoever.

It was contended because the city had the power to *regulate the use of streets* that that gave it the power to *regulate telephone rates.*

Answering this argument the supreme court of Missouri said:

> "The company is subject to reasonable regulations prescribed by the city as to planting poles, stringing wires, &c. Such regulations have been obeyed by the defendant. Conceding all this, we are at a loss to see what this power to regulate the use of streets *has to do with the power to fix telephone charges.*
>
> The power to *regulate the charges for telephone service* is neither included in, nor essential to the power to *regulate* the use of streets and the ordinance cannot be upheld on any such ground." (Italics are ours.)

To the same effect is the case of the Lewisville National Gas Company v. State of Indiana, 131 Ind. 49.

55 Kansas, 744.

The same doctrine has been announced by the court of appeals of Kentucky in the following cases:

Henderson v. City of Covington, 14 Bush 312;

City of Newport v. Newport & Cin. Bridge Co., 90 Ky., 194;

Mayer v. Lexington, 1 Ky. Law Rep. 69.

On the authority of the above cases and on general principles, appellee insists the City of Owensboro at the time it made the contract with the old water company and at the time it made the contract with appellee, having only the power to establish public wells, cisterns, reservoirs and pumps, and to provide for the furnishing of the city and the inhabitants thereof with gas and water, had no power or authority whatever to fix the rates at which any corporation, though a public service corporation, should charge private consumers for water.

If the city had no such power at the time the contracts and ordinances already mentioned were passed, then it will be held to have contracted with the old water company and appellee, with respect to the powers it had at the time and the law as it then existed, and no subsequent act enlarging the city's powers in the matter of fixing water rates to be charged to private consumers would authorize it to pass the ordinance complained of here.

CITIES OF THE THIRD CLASS.

We do not understand it is contended the City of Owensboro had authority under its charters in force at the time of the con-

tracts and ordinances involved in this case were passed, to fix the rates which individuals or companies, engaged in furnishing water for domestic purposes, should charge private consumers.

But on the fourteenth day of June, 1893, the City of Owensboro, was, under the general laws of the state, created a city of the third class. (Kentucky Statutes, sections 1063 to 1144.)

It was argued in the lower court, and is argued here, that appellant city, acquired under section 3290, sub-section 5, of the charter creating it a city of the third class, the power to pass the ordinance of March 19, 1900. Before considering whether the power claimed was in fact conferred by the act creating appellant a city of the third class, we call the court's attention to the following provisions of the charter creating Owensboro a city of the third class, wherein it is provided :

> "That the repeal of any act by the provisions of this law shall not in any wise be so construed *as to affect any right or liability acquired, or assumed thereunder, by or on the part of the city or any person or body corporate.*"

If it were conceded the city under its present charter had the legal right to fix the rates at which corporations or individuals should furnish water for domestic purposes, the fact would remain, if such water company or individual had a contract with the city under previous charters, its rights under such contracts could not be impaired, or in any wise affected by the terms or provisions of the present charter.

The general assembly of Kentucky was careful enough when

it came to establish cities of the third class to preserve all rights, franchises, privileges and liabilities acquired or incurred under previous charters.

This part of the city's present charter was of course merely declaratory of the common law, for without that provision the charter of a city of the third class would be so construed, but the court is not left to construe appellant's charter on this point, for by its express terms its provisions cannot affect any right previously acquired or contract previously made.

Appellee's rights are secured under the ordinances and contracts of September 10, 1878, and June 3, 1889, therefore the powers of the common council of the City of Owensboro under its present charter to fix water rates are in fact not involved on this appeal.

SECTION 3290, SUB-SECTION 5, KENTUCKY STATUTES.

By sub-section 5, section 3290, Kentucky Statutes, it is provided that cities of the third class shall have the right :

> "To provide the city and the inhabitants thereof with light, power, heat and telephone service, by contract, or by works of its own, located either within or beyond the boundaries of the city, to make regulations for the management thereof and to fix and regulate the prices to private consumers and customers."

It is under this supposed authority the City of Owensboro, being a city of the third class, asserts the power to pass the ordinance of March 19, 1900. An examination of the authority conferred on the city in the sub-section referred to will leave little room to doubt, we think, that power to pass the ordinance in question was not in fact conferred on the common council. But the city asserts said power was conferred.

How many cities of the third class under sub-section 5 of the section quoted, provide its inhabitants with water, &c.? The answer is furnished in the sub-section itself.

It says a city of the third class may provide its inhabitants with water, &c., (1) by contract; (2) by works of its own, located either within or beyond the boundaries of the city. It may make a contract either with an individual or a corporation to supply water, or if it chooses, it may supply its inhabitants with water "by works of its own." Since there are but two modes by which a city of the third class may supply itself and its inhabitants with water, the inquiry is, what may it do in case it has exercised either one or both of the two modes by which it is authorized to furnish itself, or to supply its inhabitants with water?

The power of appellant to pass the ordinance in question is carefully and accurately considered by the learned district judge who granted the injunction herein.

Record pages 55 and 56.

In his opinion the court discusses the power of appellant under sub-section 5, section 3290, to pass the ordinance in question.

The argument there presented is so succinct and clear,

and need not be repeated, but we ask Your Honors to examine the reasoning of the learned district Judge, on this point.

In concluding its opinion, the court says:

> "The legislature may doubtless amend the complainant's charter and thereby itself fix, or else authorize the city by ordinance to fix or regulate prices in a lawful manner, but we are clearly of the opinion the legislature has not exercised, or attempted to exercise that power through section 3290." Record p. 56.

The above is quoted from the court's opinion on the motion for an injunction pendente lite.

In its final opinion making the injuction perpetual (Record pages 322-323) the court says:

> "Since the injunction pendente lite was granted in this case a good deal of evidence has been taken, more or less pertinent to the issues of fact raised by the pleadings, but upon the view I have been compelled to take of the case, this decision must turn upon the question discussed, in the opinion granting the temporary injunction, which I need not repeat. I would only add that time and reflection have more fully confirmed my conviction that the grounds upon which that decision was put are incontrovertible.
>
> The enforcement of the ordinance of the city, which we have held to have been unauthorized and void, would by the operation of such enforcement, take from the complainant certain portions of its money or prop-

erty without due process of law and without compensation, and would thus deny to it the equal protection of the law, in violation of the constitution of the United States.

The views of the court in its former opinion are reiterated and as the City of Owensboro had no authority to pass the ordinance, the complainant is entitled to the relief prayed for.

We need not go into a discussion of the other propositions which might arise upon the bill and answer.

Even if the city be without legislative authority to do what the ordinance undertakes to do, yet the case being properly here, the court may grant full relief prayed for as it has jurisdiction of the action as presented upon the face of the bill." Schunk v. Moline & Co., 147 U. S. 500; Scott v. Donald, 165 U. S. 58.

THE CITY OF OWENSBORO HAD AUTHORITY TO ENTER INTO CONTRACTS WITH THE WATER COMPANIES TO SUPPLY IT AND ITS INHABITANTS WITH WATER FOR PUBLIC AND DOMESTIC PURPOSES.

When the City of Owensboro entered into the contract with the old water company on the tenth day of September, 1878, it had the power under its charter to make such a contract.

By the 9th section of the contract ordinance of September 10, 1878, it is provided:

"And said company shall have the power and authority to make and *enforce as a part of the conditions upon which it will supply water to its consumers all needful rules and regulations not inconsistent with the law or the provisions of this ordinance.*"

By section 13 of the same ordinance it is provided as follows:

"In consideration of the benefits which will be derived by the said city and its inhabitants by construction and operation of said water works and in further consideration of the risk of so large an investment by said company in said city in a new and untried enterprise, the rights, privileges and franchises hereby granted to and vested in said company shall remain in force and effect for twenty-five years from the passage of this ordinance. And the city hereby rents from said company for the uses herein before set out one fire hydrant at each intersection of streets along the lines of pipes hereinbefore mentioned."

By section 14 it is among other things provided as follows:

"*And after such acceptance this ordinance shall be the measure of the rights and liabilities of the said city and of the water company.*" Record, pages 27 to 29.

When these three sections are considered it will not be questioned that the old water company was in express terms granted

the right to fix the rates at which it would furnish private consumers water.

That right by the terms of the ordinance extended throughout the corporate existence of the old company.

Special attention is directed to that part of section 14 which provides, that after the acceptance of the ordinance the rights and liabilities of the city and the water company are to be measured by the terms thereof.

The old water company accepted the ordinance as required. Record page 29.

The rights of the parties being fixed by the contract any attempt on the part of the city thereafter to fix the rates or to prescribe the conditions on which the company should furnish water for domestic purposes was an impairment of the obligation of the contract.

On the third of June, 1889, the City of Owensboro extended the rights, privileges and franchises it had theretofore granted to the old company and contracted with appellee it should have same rights, privileges and franchises that had been granted the old water company, for twenty-five years from that date which contract appellee accepted.

When that contract was accepted it became binding upon both parties and appellee acquired the right, during its entire corporate existence, not only to furnish water for domestic purposes, but to do so on the terms and conditions fixed in the original contract between the city and the old water company and the ordinance was and is the measure of the rights and liabilities of the city and appellee. The contract between the city and the old water company must be read into the contract between the city and appellee for it is a part of it.

This being true it follows that the attempt to pass the ordinance of March 19, 1900, was in violation of the contract between appellee and appellant and is therefore void no matter what authority the city may have had under its charter at that date to fix water rates.

We have seen that the city had no power either on the tenth of September, 1878, or on the third of June, 1889, by the charter under which it then existed to fix water rates. But it had the power to provide by contract for the furnishing of water both for public and domestic purposes.

The city's power to make the contracts relied on by appellee has not at any time in the course of this litigation been challenged, nor do we suppose its power so do so will now be questioned.

Looking at the ordinance of June 3, 1889, it appears that the same rights, privileges and franchises which the City of Owensboro had granted to the old water company were likewise granted to appellee, and those privileges and franchises by the terms of the contract with appellee were granted to it for the entire term of its corporate existence.

Section one of that ordinance is in these words:

> "That in consideration of the purchase by the Owensboro Water Works Company, of Owensboro, Kentucky, of the water works of the Owensboro Water Company, *the franchise and license are hereby granted to the Owensboro Water Works Company, of Owensboro, Kentucky, and to its successors and assignee, for and during the existence of said corporation, to maintain, operate and com-*

plete water works in the City of Owensboro and to supply the inhabitants of said city and its vicinity with water for public and private purposes, and to use within the present and future limits of the City of Owensboro, the streets, alleys and other public highways thereof for purpose of laying, repairing and taking up mains, service pipes, hydrants and other apparatus for the supply of water."

By section 2 of the ordinance of June 3, 1889, it is provided that "the City of Owensboro accepts appellee as the successor to the contract for hydrant rentals as fully as if such contract had been originally made by the city with appellee," and in addition the city granted appellee for the term of its entire corporate existence all the rights, privileges and franchises it had granted the old water company in 1878 and these rights, privileges and franchises were to continue for a term of twenty-five years from June 3, 1889.

In other words, appellee succeeded, under that ordinance, to all the rights, privileges and franchises which were originally granted to the old water company and those rights by the terms of the ordinances and resolutions were to continue for and during the entire corporate existence of the present appellee, which corporate existence will not expire until the fourteenth day of June, 1914.

LAWS IN FORCE AT THE TIME AND PLACE OF MAKING THE CONTRACT ENTER INTO AND FORM A PART OF THAT CONTRACT.

To emphasize the position contended for by appellee to the effect that the common council of the City of Owensboro was without power to pass the ordinance of March 19, 1900, and that the ordinance is void, we ask the court to keep in mind the fact that at the time these contracts, resolutions and ordinances were made and adopted, the city, under its then charters had no power or authority to fix rates to be charged private consumers for water, no matter what appellant's rights may have been in March, 1900.

Being without such power, yet having the authority to contract with individuals or corporations to furnish water for public and private purposes, the parties will be held to have contracted with reference to the law as it then existed.

The city being without power to prescribe rates, it follows of necessity, as well as by the terms of the ordinances and contract, that the right to fix reasonable rates was vested alone in the water company.

> "Laws which exist at the time and place of making a contract, and at the place where it is to be performed affecting its validity and construction, *enter into and form a part of it.*" Walker v. Whitehead, 16 Wallace 314; Beach on the Modern Law of Contracts, vol. 1, section 734.

The City of Owensboro having no authority under its charters, at the time it passed the ordinance and made the contracts involved in this suit, to prescribe the rates which private consumers should pay for water, no subsequent legislative grant could give it that power. The exercise of such power would impair the obligations of the contracts and would be repugnant both to the constitution of Kentucky and the constitution of the United States.

There seems to be no room to doubt that the attempt on the part of the city in the ordinance complained of to regulate rates and fix prices which appellee should charge private consumers for water, and to fix the time and conditions on which such rents should be payable is plainly, an impairment of the obligation of the contracts between its predecessor and the appellee and the City of Owensboro.

This is true, regardless of the powers conferred on the City of Owensboro by its charter as a city of the third class.

The city in those contracts, resolutions and ordinances was acting in its individual or business capacity; it was not exercising a governmental function, and no subsequent council could repeal, modify or impair the terms of the contract thus made by a previous council, although the general assembly may subsequently have conferred on the city such power, and although the city may at the the time it passed the ordinance have acted under a power conferred.

Little Falls Electric Light & Water Company v. City of Little Falls, &c., 102 Federal Reporter, 663.

The Little Falls case was to enjoin the city from enforcing ordinances which the water company alleged impaired the obligations of the contract between itself and the city.

The city of Little Falls was empowered to contract for the construction of water works for the purpose of supplying itself and its inhabitants with water. The city contended that the contracts between itself and the water company were invalid because made for an unreasonable length of time and at rates which were unreasonably high.

The issue there was practically the issue presented here.

Answering the contention of the city, the court said :

> "Contracts on the part of a municipality for the supply of the municipality and its citizens with water and light are not made in the exercise of governmental powers vested in the municipal council, but in the exercise of its proprietary or business powers. In such cases it is acting for the private benefit of itself and its inhabitants, and its contracts of that character are governed by the same rules that govern contracts of private individuals or corporations."

At the time appellant made the two contracts relied on by appellee it was acting for the private benefit of itself and its inhabitants; it made the contracts in the exercise of its proprietary or business powers. Hence it follows that those contracts must be governed by the same rules of law which govern the contracts of private individuals and private corporations. It cannot be too often repeated that the City of Owensboro had the power to make the contracts, and having voluntarily entered into them, no fraud or unfairness being charged, the rights of appellant and appellee are to be measured as provided in section

14 of the ordinance of September 10, 1878, which in terms declares that "after its acceptance this ordinance *shall be the measure of the rights and liabilities of the said city and the water company.*"

The ordinance having been accepted, appellee and its successor having entered upon the performance of their part of the contract and expended large sums of money in carrying out the provisions of the contract, the right of appellee under its contracts with the city to fix rates at which it would furnish water for domestic purposes is undoubted, and all attempts on the part of the common council of the City of Owensboro to interfere with those rights is an attempt to impair the obligation of the contract which the law prohibits and the courts will not tolerate.

The district judge in his opinion granting the temporary injunction said:

> "The legislature may doubtless amend complainant's charter and thereby itself fix, or authorize the city by ordinance to fix or regulate prices in a lawful manner, but we are clearly of the opinion the legislature has not so exercised or attempted to exercise that power through section 3290."

Again, the court in making the injunction perpetual said:

> "However much the legislature might change that charter the city council of Owensboro could not do so without legislative authority even if such authority could be delegated to it at all."

The lower court holds that the city had entered into a contract with appellee and its predecessor, the terms of which could not be altered in any event, without legislative authority.

The court further expresses a doubt as to whether the legislature of Kentucky could have so amended the charter of appellant as to confer on it the right to alter the terms of the contract between appellant and appellee. The court of appeals of Kentucky has held it could not. Commissioners of The Sinking Fund v. G. and B. Navigation Co., 79th Ky., 73, and many other cases.

The city having made a valid contract no subsequent grant of power to it by the general assembly could authorize it to change the terms of the contract,

It was conceded in the lower court, if the old water company or appellee had a contract with the city wherein it and its predecessor were granted the right to fix rates of compensation for water furnished to private consumers that the terms of that contract could not be impaired during appellee's corporate existence. But it was contended that such contract was not made and sections 9 and 10 of the ordinance of September 10, 1878, were relied on to show that such right was not conferred.

Appellee insists that sections 9 and 10 and the preamble and resolution adopted by the city council when read together show that such contract was made and such right was conferred, but if the court dissents from this, appellee calls attention to section 14 of the ordinance of September 10, 1878, which says:

> "After such acceptance *this ordinance shall be the measure of the rights and liabilities of the said city and of the water company.*"

The case of Stone v. Farmer's Loan and Trust Company 116 U. S. 307, was relied on in the lower court. But that case sheds no light, as we believe, on the questions involved here. That case was a suit by a trust company, as receiver of a railroad against the state railroad commission to enjoin that body from fixing the rates it should charge for freight and passengers. This court in its opinion quotes section 12 of the railroad's charter, as follows:

> "12. That it shall be lawful for the company hereby incorporated, from time to time to fix, regulate and receive the tolls and charges by them to be received for transportation of persons or property on either railroads or way aforesaid, hereby authorized to be constructed, erected, built or used, or upon any part thereof."

After quoting this section the court says:

> "From this it is claimed that the state granted to the company for the full term of its corporate existence, that is to say, forever, the right of managing its own affairs and regulating its charges for the transportation of persons and property free of all legislative control.
>
> It is now settled in this court that a state has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction unless restrained by *some contract* in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce."

The points of difference between the case reported in the 116 U. S. and the case at the bar appear on the surface. In the 116 U. S. case the railroad claimed it had a perpetual grant, that is a grant forever. Here appellee says its grant is limited to a term of twenty-five years.

In the 116 U. S. case it was conceded by the railroad that the state had, at the time it granted to it a charter, the right to regulate or limit the amount it could charge for the transportation of persons and property, and though it was granted by the terms of its charter, the right to fix and regulate charges to be made for the transportation of freight and passengers, it accepted its charter with the implied, if not the express agreement that the state had at any time the legal right to alter or amend its charter. But that rule has no application here.

In the first place appellant city had no power under its charters in force at the time the contracts relied on here were made, to fix water rates. In the second place appellee and its predecessor paid and agreed to pay the city a valuable consideration for the right to fix the prices at which they would furnish water to private consumers. In the 116 U. S. case the railroad paid nothing for the privileges granted it.

By section 13 of the ordinance of September 1, 1878, it is among other things provided :

> "In consideration of the benefits which will be derived by the said city and its inhabitants by construction and operation of said water works and in further consideration of the risk of so large an investment by said company in said city in a new and untried enter-

prise, the rights, privileges and franchises hereby granted to and vestel in said company shall remain in force and effect for tventy-five years from the passage of this ordinance, &c." Record, page 28.

The old water company accepted the contract between itself and the city, entered upon the performance thereof and continued in the faithful execution of its part of the agreement until June 3, 1889; at that time, in view of the growth of the city and the increased demands for water for both public and private purposes, it was the joint judgment of the city and the water company that the capital stock of the water company ought to be increased and that the facilities for supplying water ought to be extended.

The old water company had not fully completed its system of works as appears by reference to section 1 of the ordinance of June 3, 1889, wherein it is recited:

"The franchise and license are hereby granted to the Owensboro Water Works Company, of Owensboro, Kentucky, and to its successors and assigns, for and during the existence of said corporation to maintain, *complete and operate* water works in the City of Owensboro for supplying the City of Owensboro and the inhabitants of said city and its vicinity with water for public and private purposes &c."

This section shows the city was of the opinion the water works system should be enlarged and extended, to carry out

this enterprise additional capital was required and appellee was requested to furnish it.

The fact should not be overlooked that at the time appellee became the assignee of the old water company it had not *completed its system of works* and with a view to the final completion, extension and enlargement of the works all the rights, privileges and franchises formerly granted the old water company were granted to appellee for and during its corporate existence. Record page 30.

Reference to the resolutions, ordinances and contracts entered into between the City of Owensboro and appellee and its predecessor show the water companies were embarking in a new and untried enterprise. They were investing large sums of money. Whether those investsments would result profitably or disasterously was an unsolved problem. The city therefore deliberately contracted with the water companies, in view of the risk they then assumed, and in view of the magnitude of the enterprise in which they were then embarking that the water companies should fix the rates they would charge private consumers for water. This was an honest and fair agreement which we think the court will delight to uphold.

Having entered into the contract with the water companies, no matter what the power of the common council of Owensboro may at the time have been or may be now, appellee cannot be deprived of the right it acquired under that contract with the city for a term of years. The city in entering into the contracts, was in the management and conduct of its private affairs and was acting in a business capacity. It had the right to make the contracts, and if there was a valuable consideration, as we have shown, the city, like an individual, is bound by its contract.

In respect to its contract with appellee and its predecessor it stands upon precisely the same footing that individuals do in reference to their contracts, and it can pass no law which will impair its obligations.

If the ordinance, which is sought to be enjoined, can be enforced, the city, with the sanction of the courts, will be permitted not only to impair the obligation of its contract, but to take from appellee its property without due process of law and to deny to it the equal protection of the laws. Appellee would be willing to rest its case on the naked rule of law, arising out of its contracts with appellant, but the terms of the proposed ordinance are so unjust, inequitable and oppressive it feels authorized to make a final appeal to the facts as they appear in this record, for no matter what view the court shall take of the law of this case, on its facts the judgment of the lower court ought to be affirmed.

III.

THE ORDINANCE OF MARCH 19, 1900, IS UNREASONABLE AND UNJUST AND IF ENFORCED WOULD OBLIGE APPELLEE TO OPERATE ITS PLANT AT AN ACTUAL LOSS.

If the court holds appellant had authority to pass the ordinance in question which for the argument which is to follow, may be conceded and that appellee has no contract with the city by which it acquired the right to fix rates to be charged domestic consumers, still the judgment of the lower court should be affirmed on the facts.

The provisions of the ordinance of March 19, 1900, the rules and regulations therein prescribed are unjust, and if enforced, would result, not only in depriving appellee of the power to earn any income whatever on its investment but would result practically in the confiscation of its property. The evidence shows that the rates fixed, the terms and conditions on which water rents are to be paid, if enforced, would result in a large loss to the company, amounting annually to from $7,000 to $10,000.

To show the unreasonableness of the rates proposed in the ordinance, appellee took the testimony of thirteen witnesses, the substance of whose evidence is as follows:

1. George B. Sidelinger.

George B. Sidelinger, is the superintendent of the water

works at Danville, Ill. He has had large experience in connection with water plants in the various cities, having been superintendent of the water works system in Kansas City, Grand Rapids and other cities.

The witness examined appellee's plant about the date of the institution of this suit, and after a careful inspection of it, fixed the value of the plant at $245,000. He examined carefully the ordinance of March 19, 1900, and testified it would be impossible for the Owensboro Water Works Company or any other company to operate the plant and make a profit on its investment under that ordinance.

He says the prices fixed are too low and that the provision of the ordinance prohibiting the collection of water rates in advance, except when voluntarily paid, would result in a loss of from 40 to 60 per cent. annually. Record pages 67 to 80.

2. Edward Hughes.

Edward Hughes, who for more than twenty-one years before he gave his evidence had been chief of the fire department of Louisville, Ky., and who examined appellee's plant carefully, declared its condition to be perfect, and that the works were adequate in every respect to furnish complete fire protection to the City of Owensboro and its inhabitants. Asked to state how the City of Owensboro, in the matter of fire protection, ranked with other cities in the United States, said, "Equal to any. I consider the fire protection of the City of Owensboro from its water works system as first class." Record, pages 81 to 82.

3. William J. McGonigle.

William J. McGonigle, who had been connected with appellee corporation since June, 1897, in the capacity of auditor, secretary and treasurer, and who was perfectly familiar with the value of appellee's plant, testified that same was of the actual cash value of $235,000 to $250,000.

Discussing the terms and provisions of the ordinance the witness testifies that the company would be obliged to operate at a loss under its provisions. Record, pages 83 to 103.

4. George B. Long.

George B. Long, manager of the Louisville branch of the United States Cast Iron and Foundry Company, and who had been engaged in the manufacture of cast iron, gas, water and culvert pipes all his life, testifies that the value of appellee's plant is from $225,000 to $250,000. He is familiar with water rates, and says the provisions of the proposed ordinance, if enforced, would be ruinous to the company; that they are entirely too low, and that there are many other provisions in the ordinance which are objectionable, which he points out, and which, he says, would result, if enforced, in great pecuniary loss to the company. Record, pages 103 to 107.

5. Alfred Walker.

Alfred Walker, who resides in the city of New Albany, Indiana, and whose occupation is that of a water works and gas works contractor, and who had been in that business for over

forty years, says he has built water and gas works in East Indies, Ottawa and Toronto, Canada, and in many other cities both in Europe and the United States; testifies he is familiar with the cost of water works, and says the cash value of appellee's plant is $225,000 to $235,000. He examined the system and says he made a thorough examination of it, and on this point he says:

> "It is a very complete system of works, the most complete works I have seen since I have been on the continent of the United States; the only fault that I find is that it is not filtered; that is the only fault, and that is the fault generally of places that take water from the Ohio river." Record, pages 109 to 116.

6. Charles Hermany.

Charles Hermany resides in Louisville, Ky., is a civil engineer, has had large experience with water works. He has for forty-three years past been the superintendent of the water works system of Louisville, Kentucky; says he examined appellee's plant about the date of the institution of this suit. He made a careful estimate of its value and fixed the value of the water pipes, hydrants, gauges, &c., at $120,000; pumping station, machinery and apparatus thereto belonging at $110,000, making a total value of the plant of $230,000. Speaking of the rule prevalent among water companies in the matter of collecting water rates, witness says it is the almost universal rule to collect water rents in advance from periods varying from three months to a year in advance.

The witness testifies that he had carefully examined the ordinance complained of and if its provisions were enforced "that the company could not pay its fixed charges out of the revenues which such an ordinance would afford, &c." Record pages 117 to 121.

7. William Rudd.

William Rudd, an insurance adjuster, residing at Owensboro, testifies that by reason of the efficiency of the service furnished by appellee, the rates of insurance have been reduced twenty-five per cent. and that Owensboro is, in the matter of fire protection, rated as a first-class city. Record pages 125 to 128.

8. Asa Williams.

Asa Williams, an engineer, in the employ of the Owensboro Water Works Company, and who is perfectly familiar with its pumping station and pipe system, which is over twenty-seven miles in length, accurately describes the whole system, states its efficiency and fixes its value. Record pages 129 to 148.

9. Thomas Yager.

Thomas Yager, who was chief of the fire department in the City of Owensboro for four years preceding the year 1900, says, "the efficiency of the water works system was all that was required, it furnished as good pressure of water as was needed." Record pages 148.

10. Henry Steubing.

Henry Steubing, a civil engineer, superintendent of the water works at Evansville, Ind., says, "I made a careful examination of the whole Owensboro plant, going over the engine house, boiler house, and map of the pipe system here in Owensboro." When asked to state the fair cash value of appellee's plant in the City of Owensboro in April 1900, he says, its cash value on that date was $257.000.

The witness testifies that he examined the ordinance passed by the City of Owensboro nineteenth of March, 1900. Discussing the result to the company from the enforcement of the ordinance he says the single provision of the ordinance which prohibits the collection of rents in advance would result in a loss to the company annually of fully thirty per cent. Referring to the rates fixed in the ordinance the witness testifies that the water works system of Evansville is owned by the city and that an examination of the ordinance proposed shows the rates fixed therein are lower than the rates at Evansville. (Record pages 149 to 158.)

The court knows that in cases where municipal corporations own their own works rates are fixed as low as they can be and not with a view of earning any profits whatever. The statements of this witness leaves no room to doubt that the rates fixed in the ordinance complained of deny appellee any income whatever on its investment.

11. Owen Ford.

Owen Ford, who is a consulting and supervising engineer,

testifies that he has constructed and assisted in constructing about two hundred water plants in the United States and in Mexico. He is familiar with the cost of building, constructing and operating such plants. He says he examined appellee's plant about the first of April, 1900, and says its fair cash value at that time was $250,000.

He says the annual depreciation of a plant like appellee's resulting from operation and natural wear and tear is about three and one-half per cent.

Discussing the ordinance in question witness declares the rates fixed are unfair and inequitable; that they are much lower than the rates charged in other cities of similar size.

Mr. Ford further states that he has had occasion to examine into the rates charged in various cities for the special purpose of ascertaining and using same in the course of his business, that he has examined the rates charged by both muncipal plants and plants managed by private corporations, and that the rates named in the ordinance here are unreasonable and much lower than rates in force in similar cities throughout the country.

He says the ordinance is unreasonable in prohibiting the collection of water rates in advance, that the conditions in the ordinance relating to collection of water rents, as to the time and manner of collecting them is unreasonable and if enforced the result would be a loss so great as to render the successful operation of the plant impracticable.

In his evidence this witness shows that to operate under the terms of the ordinance would result annually in an actual loss to the water company. Record page 166.

12. J. W. Holmes.

J. W. Holmes, resides at Bessemer, Alabama, and is manager of the United States Cast Iron Pipe and Foundry Company's plant at that place. This witness says he has been engaged in the construction of many water works and reconstructed the water works system at Owensboro. He is perfectly familiar with appellee's plant, its original cost, its condition, and its present cash value, which he says is $280,000.

Witness testifiess he is familiar with water rates usually charged in cities of the class to which Owensboro belongs and that the rates the company adopted on the first of April, 1896, and which are yet in force are not higher than the average rates charged in other cities throughout the United States. Discussing the ordinance of March 19, 1900, the witness says, the rates therein fixed are unreasonable and unjust and if enforced "would be *equivalent to confiscating the property of the Owensboro Water Works Company of Owensboro.*" The witness points out in detail the various features of the ordinance which are unseasonable and unjust and discloses what loss would result from denying appellee the right to collect its water rents in advance.

The court's attention is specially called to Mr. Holmes' discussion of that provision of the ordinance which requires that a meter be placed for any person upon application and demon-

Record pages 172 to 179.

13. Frank Schefold.

Frank Schefold, who is a water works engineer residing in New Albany, Indiana, testifies that he has been engaged in the

construction and operation of water works plants for over twenty-five years last past, has built water works systems in Illinois, Kentucky, Indiana, Tennessee, West Virginia and Ohio, and that he is familiar with the cost of constructing and operating such plants in the United States.

Mr. Schefold testifies that he made a thorough examination of appellee's plant during the month of March, 1900, that he considers it superior to any plant he ever saw for the size of the city, that the machinery is above the average of the kind used in such cities, of a very modern plan and well constructed. This witness fixes the cash value of appellee's plant at $250,000; the value of the pipe system at about $125,000, and the value of the pumping station therein at about $125,000.

He says the depreciation resulting from the prudent operation of a water works system is about 3½ per cent. per annum. He examined the ordinance proposed and declares the rates therein are entirely too low to permit the operation of appellee's plant. He says they are lower than any rates in his experience of plants which pay their own running expenses. He also testifies that he has examined a great many rates in cities of similar size, operated by private corporations, and the rates fixed by the ordinance, are, he says, *unreasonably low*. He also states that some of the rates fixed in the ordinance are so low that they would not pay the expenses of the service pipes and maintenance of same and collection of rents therefor, and the rates are far lower than any other rates charged by plants in towns the size of Owensboro, and that there are no reasons why a plant at Owensboro can furnish water any cheaper than in other cities of similar size. Discussing the provision of the ordinance which

prohibits the collection of rents in advance, except when paid voluntarily, the witness shows the unreasonableness of its terms. According to this witness it will cost annully $25,000, under an economical management, to operate the plant at Owensboro and the revenue as shown by other witnesses which could be earned under the ordinance proposed would not amount to more than about $17,000. (Record pages 183 to 187.)

WILLIAM J. McGONIGLE'S EVIDENCE ONCE MORE CONSIDERED.

We have seen that Mr. William J. McGonigle, who is not only the auditor, secretary and treasurer of appellee company, but likewise holds the same positions for the Danville water works company, of Danville, Illinois, the water works company of Defiance, Ohio, and for the water works company at Frankfort, Ky., is in a position to state with great accuracy not only the value of appellee's works, the annual cost of operating the plant, but the reasonableness of the terms of the ordinance proposed.

We invite the attention of the court to what he says on these subjects and quote from his evidence as follows:

"Q. 25. What is the amount of hydrant rental which the Owensboro water company receives at present from the City of Owensboro annually?

A. $7,595.

Q. 26. Has the company any other source of rev-

enues besides that earned from the city for hydrant rentals and from its private consumers?

A. No.

Q. 27. On the basis of the proposed ordinance; would the Owensboro Water Works Co. receive a revenue sufficient to pay its operating expenses, natural wear and tear of the property and any return on its investment?

A. In my opinion it would not.

Q. 28. In your judgment what would be the net annual loss to the company operating under this ordinance?

A. $5,600.

Q. 29. Do you assume in making that answer that the water company would collect all of its rates under the proposed ordinance?

A. That result is arrived at provided every dollar is collected from its consumers.

Q. 30. Mr. McGonigle, are you in a position to state whether or not the Owensboro Water Works Company has ever paid any dividends to its stockholders?

A. I certainly am.

Q. 31. Has the company at any time paid any dividends to its stockholders?

A. Never.

Q. 34. Under the proposed ordinance what would be the amount the company would receive from domestic service?

A. $11,500.

Q. 35. From hydrant rental?

A. $7,595.

Q. 36. What is your estimate of the operating expenses of the Owensboro Water Works Company?

A. $13,000.

Q. 37. And for taxes?

A. $2,500.

Q. 38. And for depreciation?

A. If I remember rightly I estimated it at $9,000, and I have no reason to change that now.

Q. 39. That is estimating that every dollar for domestic service would be collected?

A. Yes, sir.

Q. 40. Can you state what is the per cent. of loss on domestic service when collecting its rent in advance?

A. In the neighborhood of twenty per cent.

Q. 42. Did or not your estimate of $5,600 as a net annual loss to the company from operating under the proposed ordinance include any estimate for uncollected bills?

A. Oh no, I did not include the estimate for uncollected bills, that as I stated would be the result provided every dollar was collected.

Q. 43. In your judgment what would be a reasonable estimate of the uncollected bills if the company should operate under the proposed ordinance.

A. I can surely say we would lose in the neighborhood of $2,000 per year of the revenue."

Record pages 86 and 87.

The quotations from Mr. McGonigle's evidence show that to operate the water works plant under the proposed ordinance the company would be required to do so at an annual loss of $7,600.

No witnesses were introduced to contradict the statements of this witness. On the contrary the twelve other witnesses introduced by appellee corroborate his statements.

The court is hence brought face to face with the proposition that if the ordinance in question is enforced appellee will not only earn no income whatever upon $250,000 of capital it has invested, but will be required to operate its works at a loss and thus it will be deprived of its property without due process of law and denied the equal protection of the law.

WHAT THE PROOF ESTABLISHES.

A review of the evidence of the thirteen witnesses to whose testimony reference has been made establishes the following facts:

1. Appellee's plant was at the date of the passage of the ordinance sought to be enjoined, the most complete and efficient system of water works ever installed or operated in any city of the population of Owensboro, and was, at that date, of the actual cash value of $250,000.

2. The service it rendered both for public and private purposes was first-class.

3. The water rates fixed by appellee in 1897, which were in force at the institution of this action were reasonable and below the average rates charged by cities of like population.

4. That under a prudent and economical management of the plant, the operating expenses, wear and tear, repairs, county state and municipal taxes amounted annually to $25,000.

5. That the company has never been able to pay any dividends to its stockholders.

6. That under the proposed ordinance no more than $17,000

per annum could be earned by the company. Hence it would be obliged to operate at an annual loss of say $7,000.

7. That the terms and provisions of the ordinance in question are unreasonable and unjust. The rates fixed by it are so low that the company cannot operate its plant except at the loss above stated, and its provisions as to when rents may be coerced and with respect to attaching meters, find no parallel in the regulations prescribed for any water company in the United States or elsewhere.

If these propositions are established by the proof, and we say they are, it follows that no matter whether the common council of the City of Owensboro has, under its present charter, the right to fix the rates of compensation to be charged to private consumers or not, the fact remains that the ordinance it seeks to enforce ought to be enjoined, because if it is enforced appellee will, without reference to its contracts with the city, which we have discussed in a former part of this brief, be deprived of its property without due process of law. Its property will be taken without compensation and it will be denied the equal protection of the laws.

The evidence offered by appellee is practically uncontroverted. The only opposing testimony is that of Charles F. Sturdevant, who, though a consulting civil engineer, has no actual knowledge of the nature or value of appellee's plant.

Appellant also took the deposition of Robert A. Cummins, who, at the date he gave it was in the employ of appellant. Cummins fixes the value of appellee's property at $124,500. Record, page 235.

The witness Sturdevant estimates the cost of defendant's sys-

tem at $111,840. The witness James P. Weigal fixes the value at $80,000.

These are the only witnesses introduced by appellant, who speak of the value of appellee's works.

Reference to their testimony shows that they were practically without information as to the value of the works, and that their testimony in no wise affects the succinct and intelligent statements made by the thirteen witnesses introduced by appellee. None of appellant's witnesses speak of the reasonableness of the rates proposed in the ordinance.

The remaining question then is, assuming the common council of Owensboro had the right to prescribe water rates, which right it is here asserting, whether or not the terms proposed are reasonable; for granting the common council of Owensboro has the right to prescribe water rates, the major fact is that it must prescribe reasonable rates. It cannot prescribe rates so low as to prevent the water company from realizing a reasonable income on its investment, that would be in violation of the provisions of the federal constitution, so often referred to in this argument.

THE REASONABLENESS OF RATES FIXED BY MUNICIPAL CORPORATION OR BY THE LEGISLATURE OF THE STATE MAY BE REVIEWED BY THE COURTS.

Though a municipality is acting under an express legislative grant authorizing it to fix rates, nevertheless if the rates

fixed deprive the corporation of the reasonable earnings to which it is entitled, the courts have jurisdiction to enjoin the enforcement of such an ordinance.

When it is claimed the rates fixed by the common council of a municipality for the furnishing of water will deprive the corporation furnishing it of reward, the courts may ascertain whether the power has been carried beyond the constitutional limits, and if so, declare the act void.

> "The court is not limited to the evidence produced before the common council or other body authorized to fix the rates, and may act without knowing what such evidence was.
>
> Whether the action of the council or other body was beyond the constitutional limits *is a mixed question of law and fact* to be determined by the courts upon evidence produced before them. San Diego Water Co. v. City of San Diego, 118 Cal. 556.

In that case the constitution of California conferred on municipalities the right to fix rates of compensation to be charged by water companies. The single question there was as to the reasonableness of the rates fixed in the ordinance. Considering that question the supreme court of California says:

> "The power of the state to fix and regulate rates of compensation to be charged by persons and corporations in charge of certain public utilities *is so limited by the constitution of the United States* that it cannot be so

exercised as to require the furnishing of property or services without reward."

This is the point appellee, under this branch of the case, is urging against the validity of the ordinance in question.

"If rates are fixed by legislative power or authorized by proper judicial proceedings in which full notice and opportunity to be heard are given, it is still within the province of the courts to review such question to the extent at least of determining whether the rates so fixed will furnish some reward for the property used and the services rendered. To fix rates which will not allow such reward is to take property for public use without compensation." 118 Cal. 556.

In the case at the bar appellee was never given any notice of the proposed passage of the ordinance in question; it never had any opportunity to be heard before the legislative body which passed it.

It insists that the rates fixed in that ordinance not only deprive it of reasonable compensation, but would, if enforced, oblige it to operate its plant at an actual loss.

In the 118 California case, the court further says:

"When it is claimed that the rates fixed by the common council of a municipality for the furnishing of water will deprive the corporation furnishing it of re-

ward, the courts may ascertain whether the power has been carried beyond the constitutional limits, and if so declare the action void."

It follows from the authority above referred to that the question of fact as to the reasonableness of the rates fixed in this ordinance is open for review by Your Honors.

WHAT IS REASONABLE COMPENSATION.

In determining the compensation to which a water company furnishing water to a municipality and its inhabitants is entitled, neither the sum for which the appellee's works could be sold in the market nor the cost of replacing them is controlling, for the money the company has reasonably expended for the public benefit in erecting its works is entitled to a reasonable reward.

> "If the business appears to be honestly and prudently conducted, the rate the company should be compelled to pay for borrowed money would furnish a sufficient though not always a safe criterion which would be deemed reasonable."

In discussing the compensation a water company is entitled to receive, the supreme court of California, in the case quoted says:

> "The fact that some reward or compensation is allowed to a water company for water furnished the mu-

nicipality, is not conclusive of the power of the court, the question of just compensation is a judicial question to be determined by the ordinary course of judicial proceedings. Whenever the rates fixed by the common council of a municipality are grossly and palpably insufficient to furnish such revenue as will afford compensation redress may be had in the courts." 118 Cal. 556.

RATES WHICH SHOULD BE ALLOWED.

"In fixing the water rates the common council should provide for just and reasonable compensation to water company. The rates ought to be adjusted to the value of the services rendered and this means that the company should be allowed to collect only a gross income sufficient to pay current expenses, maintain the necessary plant in a state of efficiency and declare a dividend to stockholders *equal to at least the current rates of interest, not on the* par value of the stock but on the actual value of the property necessarily used in providing and distributing the water to consumers." Reagan v. Farmers Loan, &c., Co., 154 U. S. 362.

The doctrine announced by the supreme court of California in the case referred to is approved in the 154 U. S.

In Chicago, &c., R. R. Co., v. Minnesota, 134 U. S., 418, this court says:

"If the company is deprived of the power to charge reasonable rates for the use of its property, and such

deprivation takes place in the absence of an investigation by judicial proceedings, it is deprived of the lawful use of its property, and this in substance and effect is the taking of the property itself without due process of law, and in violation of the constitution of the United States, and in so far as it is thus deprived while other persons are permitted to receive reasonable profit, upon their invested capital, the company is deprived of the equal protection of the law."

In Stone v. Farmers Loan, &c. Co., 116 U. S. 307, this court says:

"From what has been said it is not to be inferred that this power (the power to regulate rates) or limitation or regulation is itself without limit. This power to regulate is not a power to destroy, the limitation is not the equivalent of confiscation under pretense of regulating freights and fares, the state cannot require a railroad corporation to carry persons without reward, neither can it do that which in law amounts to a taking of private property for public use without just compensation or due process of law."

The same doctrine is declared in:

Banking Company v. Smith, 128 U. S. 174.

Rued v. N. Y., 143 U. S., 517.

Reagan v. Farmers Loan, &c., 154 U. S., 362.

St. Louis, &c. Ry. v. Gill, 156 U. S. 649.

In Ames v. Union Ry., 76 Federal Reporter, 176, the court says:

"The value of property cannot be destroyed by the legislature depriving the owner of adequate compensation. The power which the legislature has is only to prescribe reasonable rates *not any rates.* It is obvious, said another judge, that it must be held that the right of judicial interference exists only when the schedule of rates established shall fail to secure the owners of the property some income or compensation for their investment, or else, the court must when properly called on to do so, adjudge whether the rates established by the municipal authorities are so manifestly unreasonable as to amount to a taking of property for a public use without just compensation.

In Smith v. Ames, 169 U. S., 525, this court says:

"In this case it appears by the testimony of a witness, whose general fairness and competency to speak of the facts were unquestioned, that the average reduction made by the statute on all the commodities at local rates was 29½ per cent."

It further appeared in the case cited that if the reduction made was enforced the road would be obliged to operate at a loss. On that state of case this court held the statute was void. It is unnecessary to multiply authorities on a question so well settled, not only by the decisions of this court, but by the decisions of courts of last resort in all the states, so far as we have examined them. We believe it is entirely accurate to say that the uniform rule established both by federal and state courts is,

that legislation which does not provide a fair and reasonable return on the investment is obnoxious to the constitution of the United States.

In determining whether rates are adequate or inadequate courts will form an intelligent judgment from the proof presented and will not rely upon mere conjectures.

The courts after considering the evidence produced will reach their own conclusions regardless of what may have gone before. They will give to the facts the weight to which they are entitled, and on the facts determine whether or not the rates prescribed are reasonable or unreasonable. If they are unreasonable, or if they deny the individual or the corporation a reasonable or a fair return upon the investment the ordinance or the act of the legislature will be held void.

A municipal council, no matter how broadly it may have been invested with power to fix rates will be held to fix reasonable rates. It cannot act beyond such delgated powers, for ex necessitate, such action is invalid, because it is not within the scope of the power delegated.

All the court has to determine in this case on the branch of it now under consideration, if it reaches the facts, is as to the reasonableness of the rates and as to whether or not if the ordinance is enforced a reasonable return can be had on the investment.

In San Diego Land and Town Co., v. National City, 174 U. S. 64, this court says:

> "The contention of the complainant in the present case is that in ascertaining what are just rates, the court should take into consideration the cost of its plant; the

cost per annum of operating the plant, including interest paid on money borrowed, any reasonable expense necessary to the used in constructing the same, the annual depreciation of the plant from natural causes resulting from its use and a fair profit to the company over and above such charges for its services in supplying water to consumers, either by way of interest on the money it has expended for the public use or upon some other fair and equitable basis should be considered. Undoubtedly all these matters ought to be taken into consideration and such weight given them when rates are being fixed, as under all the circumstances would be just to the company and to the public.

The basis of calculation suggested by appellant is, however, defective, in not requiring the real value of the property and not the fair value of the services rendered to be taken into consideration. What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public. The fair value of appellee's plant being $250,000, a fair income would be $15,000. The proof shows it makes nothing."

An ordinance which deprives a corporation or an individual engaged in the business of furnishing water a just compensation is repugnant to the federal constitution.

Since we have seen the ordinance in question would, if enforced, deprive appellee of a just or any compensation it is in violation of the constitution of the United States, and whether the city did or did not, have the right to fix water rates at the time

it passed the ordinance in March, 1900, the enforcement of that ordinance ought to be enjoined on the facts as they appear in the record.

The following cases are relied on to sustain this position :

Smyth v. Ames, 169 U. S. 446;

R. R. Commission Cases, 119 U. S. 307 ;

Dow v. Beedleman, 125 U. S. 680 ;

George R. & Banking Co., v. Smith, 125 U. S.;

St. Louis & San Francisco Co., v. Gill, 166 U. S. 649 ;

Covington & Lexington Turnpike Road v. Sanford, 168 U. S.

APPELLANT'S BRIEF.

We have just been furnished a copy of appellant's brief. The arguments therein have already been responded to, except the following propositions, to which we invite the court's attention :

First. It is contended by appellant not only in its brief but in its answer, that the City of Owensboro under its present charter had the power to pass the ordinance complained of.

Second. In its brief, at page 30, appellant says :

> " If it did not have such power the case ought to be dismissed, because no federal question is presented."

Hamilton Gas Light Company v. Hamilton City, 146 U. S. 265, is cited in support of this suggestion. But appellant does not urge this point, presumably because if this court should hold

there is no federal question involved, that would in substance and in fact be to hold that the City of Owensboro did not have, under its present charter any power to pass the ordinance of March 19, 1900, which is precisely one of the points appellee is insisting upon.

We have seen the city is contending it has such power and if this court concludes there is no federal question it will do so on the single ground that the city charter of Owensboro does not confer on it the authority to pass the ordinance in question.

Such ruling would sustain one of the contentions of appellee, because, it is urged in the bill that the City of Owensboro no matter what power it has under its present charter, had previously contracted with it that it should fix water rates to private consumers during its entire corporate existence.

Whatever view the court may take of section 3290, sub-section 5, of appellant's charter, it appears to be reasonably plain that it can fix water rates in only one of the two following states of case :

1. It may erect works of its own for supplying water to itself and inhabitants, in case it erects its own works, it could of course prescribe rates to be charged private consumers.

2. It may, in the absence of works of it own, supply itself and its inhabitants with water by contract, and in that case where it has acquired the right by contract, it may prescribe the rates to be charged to private consumers.

But the city has not exercised the power conferred on it by erecting works of its own, nor has it acquired the right by any contract to supply its inhabitants with water.

Danville Water Company v. City of Danville, 180 U. S. 578.

This case is cited by appellant as having some possible bearing on the issues involved. But an examination of the Danville Water Company case and the case of the Freeport Water Company v. City of Freeport, 180 U. S. 619, which involved the same question, will show that those cases have no application to the case at the bar.

The court's attention is directed to the opinions delivered in those cases and it is believed an examination of them will show how widely different the question involved there is from the questions involved in this case.

But if Your Honors hold that appellant, under its present charter had the power to pass the ordinance in question, then appellee appeals to the doctrine announced by this court in the case of Los Angeles v. Los Angeles City Water Co., 177 U. S. 559, wherein this court says:

> "The contention is that if the contract of 1868 is valid and the ordinance of 1897 reduces the income of the company below that which it should receive, the ordinance is void on its face, as being in conflict with the federal constitution and is no cloud on complainant's title.
>
> It is hence deduced that the water company has adequate legal remedies, and cannot resort to an equitable one. We concur with the learned trial judge that the ordinance is not void on its face. As said by him, 'in the case at bar, however the ordinance upon its face is valid, and its invalidity appears only when considered in connection with the contract of July 22, 1868, and evidence showing what the wates rates were

at that date.' While the court takes judicial notice of the ratifying act of April 2, 1870, still, since the provisions of the contract of July 22, 1868, are not embodied in said act, I am not sure that the said provisions are matters of judicial knowledge, although such seems to be the ruling of the court (one of the justices dissenting) in Brady v. Paige, 59 Cal. 52. Conceding however, that the court will take judicial notice of all the provisions of said contract still the one in question simply provides that the water rates shall not be reduced below the rates then charged without indicating what those rates were, and therefore the invalidity of the ordinance appears, not upon its face, but only in connection with extraneous evidence of what the rates were in July, 1868, and for this reason complainants have adduced that evidence in the present case."

And further:

"The complainants must either submit to the terms of the ordinance or incur unusually onerous expenditures. It is reasonably certain that if the ordinance is to stand, and they were to undertake the collection of rates in excess of those prescribed in the ordinance, they would be resisted at every point by the consumers of water, and thus be driven to innumerable actions at law. Besides, should they, in any instance succeed in collecting without an action, a higher rate than the ordinance prescribes, it is equally certain that they would thereby bring upon themselves protracted and heavy litigation, having for its object forfeiture of their entire system of

works. Surely these injuries are irreparable and actions at law, so far from being adequate to the exigencies of the situation, are, as complainants in their brief forcibly put it, mockeries of a remedy."

The Los Angeles case holds no matter how broad the power of appellant under its charter may be with respect to fixing rates to be charged private consumers, if the city had contracted that right away prior to the adoption of its present charter, then the ordinance is void. In order to ascertain whether the ordinance is or is not valid, an appeal must be made to extraneous evidence, namely the previous contracts between appellant and appellee and its predecessor. In such case this court holds that a federal question is presented regardless of the powers which may or may not be vested in appellant under its present charter.

An affimance of the judgment of the lower court both on the law and facts is respectfully asked.

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SWEENEY, ELLIS & SWEENEY,

BINGHAM & DAVIES,
Of Counsel

NO. 18546.

Supreme Court of the United States

OCTOBER TERM, 1903, NO. 58.

CITY OF OWENSBORO, ... Appellant,

vs.

OWENSBORO WATER WORKS COMPANY, OF OWENSBORO, KENTUCKY, ... , Appellee.

SUPPLEMENTAL BRIEF FOR APPELLEE.

May it please Your Honors:

Having just seen the brief of counsel for the city, we beg leave of the court to have our supplemental brief considered. We shall attempt to combat several arguments by opposing counsel, and shall submit a brief summary of our own contentions.

I.

It is contended in several places in the brief of opposing counsel, in a vague way, that the rights, powers, privileges and franchises of the old *Owensboro Water Company* could not pass, and did not pass, by transfer and conveyance to the new *Owensboro Water Works Company.* Opposing counsel claims that this transfer of franchise rights could not take place because of the lack of power in the old company to transfer its corporate franchises to the new company. He contends that even the ratification, by the ordinance of the city, could not make a void transfer a valid one. We can not see what this contention has to do with the case at bar. The point was not raised in the court below;

it was not in issue there, and it has not been placed in issue by counsel in this court. The point appears in the brief of opposing counsel and does not appear in other and proper form in the records of the case. Opposing counsel seeks to use this point to show that some of the most important contractual privileges did not pass from the old company to the new company, which privileges and rights the present company relies upon in making its own rules and regulations and fixing its own rates. It will be remembered that in 1878 the *Owensboro Water Company* was incorporated, and, by the ordinance of that year, was given franchise rights in the city of Owensboro, and, among other franchise rights, it was given the power, by the ordinance of the city, *to make its own rules and regulations for furnishing a supply of water to the inhabitants of the city.* This right, as well as all the other rights, was given by the ordinance of 1878 to said old company and its assigns and successors. In 1889, the *Owensboro Water Works Company* was incorporated and received a transfer and assignment of the rights, powers and franchises of the *Owensboro Water Company* in the city of Owensboro. In the same year (1889) the city of Owensboro passed and adopted an ordinance recognizing, ratifying and authorizing the transfer of the rights, powers and franchises by the old *Owensboro Water Company* to the new *Owensboro Water Works Company.* This was fourteen years ago. It will be remembered that, among the powers, rights and franchises granted to the old company, and transferred by the old company to the new company, was the contractual right to make its own rules and regulations for supplying water, and the wording of the franchise upon this subject, in the ordinance of 1878, was as follows:

> "Sec. 9. The said company shall have the power and authority to make and enforce, as part of the

condition upon which it will supply water to its customers, all needful rules and regulations not inconsistent with the law or the provisions of this ordinance.

"Sec. 10. The said city will adopt and enforce ordinances protecting the said company in the safe and unmolested exercise of these franchises and against fraud and imposition, and against injury to the hydrants rented by it to the said city, and against waste of water by consumers."

Now, then, opposing counsel claims that, on account of the voidness of the transfer by the old company of its franchise rights to the new company, this contractual right does not pass to the present company. He contends for this in the face of the fact that by solemn ordinance passed and adopted in 1889, the city ratified and accepted the transfer of the complete franchise, and all of its rights and powers, from the old company to the new, and has since that time acquiesced in such transfer. We do not forget that opposing counsel has not raised this question properly and that it appears for the first time in his brief. The old *Owensboro Water Company* was incorporated under the law contained in chapter 56 of the General Statutes of Kentucky, then in force. The transfer was made in 1889 by the old company to the new company with this chapter 56 of the General Statutes of Kentucky still in full force and effect. The first section of this statute of Kentucky provides:

"Any number of persons may associate themselves together and become incorporated for the transaction of any legal business, except banking and insurance, and for the construction of railroads; but such incorporation shall confer no powers or privileges not possessed by natural persons, except as hereinafter provided."

Subsection 6 conferred the following power upon cor-

porations, except banking, insurance and railroad corporations:

> "To make contracts, to acquire and transfer property possessing the same powers in such respects as private individuals now enjoy."

Section 17 provides:

> "Persons acting as a corporation under the provisions of this act should be presumed to be legally organized until the contrary is shown and no such franchise shall be declared actually null or forfeited, except in a regular proceeding brought for that purpose."

Section 18 provided that no person sued for injury to the property of such corporations, or for wrong done to such corporations, should be permitted to rely upon a want of legal organization upon the part of such corporations.

The force of this Kentucky statute was that it made all corporations, except banking, insurance and railroad corporations, able to *contract* and *acquire property by transfer just as individuals could do*, and it put into possession of such corporations the same powers, with respect to contracts and transfers of property, as were enjoyed by individuals. This is clearly provided for in subsection 6 above quoted. This Kentucky statute created the presumption of the legal organization of the company owning a franchise, and declared that such franchise should not be forfeited, or considered null, until after successful proceedings had been instituted and closed in the regular way for forfeiting and nullifying such franchise. This is provided for in section 17 of the said statute. The ordinance of 1889 which conveyed to the *Owensboro Water Works Company* the franchise of the *Owensboro Water Company*, created a resulting

franchise in favor of the new company. *That franchise has never been broken or nullified by any proceedings of a regular nature, and the present company has operated under it for fourteen years.* Now, for the first time, in his brief, opposing counsel says that the franchise right of the old company to make its own rules and regulations for furnishing a supply of water did not pass by transfer from the old company to the new company, or by the ratification-ordinance with respect to such transfer in 1889. Upon the face of the written franchise of the old company that contractual right existed, and upon the face of the transfer by the old company to the new company, and upon the face of the ratifying and enabling ordinance of 1889 that franchise and contractual right existed, and it passes from the old company to the new company as a contract and a franchise right. The said chapter 56 of the General Statutes of Kentucky provides plainly that a franchise of a corporation shall not be declared null or forfeited, *except in a regular proceeding brought for that purpose.* No such regular proceeding has ever been brought to nullify or forfeit said franchise or any of its provisions or parts. The record in the case at bar does not show such a regular proceeding and it does not appear anywhere. Opposing counsel contents himself with vaguely claiming the voidness and nullity of one of the most important rights contained in the franchise of the present company by transfer from the old company and by ratification of the ordinance of 1889. As to what a regular proceeding for nullifying and forfeiting a franchise is we need not say, as it is too clear for argument that such a proceeding has not been entered into and does not appear in the record of this case. This statute of Kentucky, which was in force at the time of the creation of the old company, and at the time of the creation of the new company, and at the time of the

transfer by the old company to the new company and the ratification of such transfer by the ordinance of 1889, gave to both the old company and the new company the absolute right to make all contracts and to acquire and transfer all kinds of property just as a private individual could do, and gave to such companies all the powers in such respects as were enjoyed by private individuals. We quote again sub-section 6 which grants the powers:

> "To make contracts, to acquire and transfer property possessing the same powers in such respects as private individuals now enjoy."

It is useless to take time and space to further combat the vague argument in the brief of opposing counsel in regard to the nullity of the franchise rights enjoyed by the present company by transfer from the old company through the ratification ordinance of 1889. In support of our arguments, however, we cite the following cases:

> American Water Works Co. v. Farmers Loan & Trust Co., 73 Fed., 956.
>
> Austin v. Bartholomew, 107 Fed., 349.
>
> Carlisle v. Carlisle, W. L. & P. Co., 36 Ill. App., 28.
>
> Columbia W. & P. Co. v. Columbia, 5 S. C. N., 225.

II.

Counsel for the city, in his brief, relies on the cases of Freeport Water Co. v. Freeport and Danville Water Co. v. Danville in 180 U. S. These cases do not control the case at bar. They are cases arising under claims made by the city under an Illinois statute. The wording of that statute and the provisions of the Illinois Constitution in respect to the scope of that statute are consid-

ered and passed upon. The intervening judgment and decision of a State court also come into consideration in these cases as matters to be weighed in construing and in applying the Illinois statute. No such decision of a State court comes into the case at bar.

III.

A State is inherently, as a sovereign, vested with powers of regulating corporations, and fixing the rates charged by them for public services, because corporations are the creations of the State.

A municipality is a corporation itself and a creation of the State, and its powers of regulating corporations and fixing their rates are strictly confined to

(1) The municipal charter,

(2) The statutes and laws of the State, and

(3) The general police powers.

All the cases relied on by opposing counsel (Munn, Budd, San Diego, Ames, etc.) are cases where either

(1) The *State* has sought to fix rates,

(2) A city claims *charter or statute power* to do so,

(3) Or a city attempts to proceed under *police power.*

The city of Owensboro proceeds to attempt to enforce its ordinance under

(1) Its charter powers in sections 3290 and 3438, Kentucky Statutes, and under

(2) Its police powers.

The charter powers, in sections 3290 and 3438, Kentucky Statutes, are discussed in our original brief (pp. 8-19). The police powers are discussed in our original brief (pp. 19-24). The application of sections 3290 and 3438 is shown in Pikes Peak Power Co. v. City of Col. Springs, 105 Fed., 9, 10.

The police power is explained in Lake Shore, &c., R. Co. v. Smith, 173 U. S., 683.

IV.

If the right to regulate rates exists, and, for argument, let us grant that it does, it is settled that the regulation *must* allow the company to earn a *fair* and *reasonable* return on the investment, and the regulation must be *reasonable*. This is finally and definitely fixed by Cotting v. Godard, etc., 183 U. S., 79.

V.

Opposing counsel, in his brief (page 5), says that it is his contention that the company's gross income is $30,000 per annum. Of this, he says $7,400 is paid by the city. Then, he says, $22,600 is paid by private consumers. He claims that annual operating expenses amount to $6,000. Taxes, he says, are $2,500. Then, he claims that depreciation is $2,000 or $2,500. Then he admits that the reduction by the ordinance will amount to 30 per cent. Calculation shows that 30 per cent. of $22,600 (the part of the income to be affected by the ordinance) is $6,780. He says that this arrangement will yield 12 or 13 per cent. upon the value of the plant, which, he says, is $90,000 or $100,000. This brings counsel down to a statement that the company, under the ordinance, can earn about 12 or 13 per cent. He does not count as an expense or out-go to the company its *floating debt* (over $19,000) or the *interest* (6 per cent.) on that floating debt. He does not count in the *sinking fund*. He does not consider *bad debts*. He argues that interest on bonds can not be counted in as a legitimate expense, and he does not count that in accordingly. So, then, he leaves out *any* interest on *any* floating debt and *any* floating debt and *any* interest on bonds and *all* bad debts. Shall not *some* interest on *some* bonds and *some* interest on *some* floating debt be paid, and *some* pay-

ment be made on *some* sinking fund? The cases which consider the bonds and floating debt and sinking fund, etc., as proper or improper things to be considered in determining what basis shall exist for calculating what is reasonable in the way of rates, only hold this, and nothing more: THAT OVER-CAPITALIZATION AND OVER-BONDING CAN NOT BE CONSIDERED AS CONSTITUTING A BASIS FOR COMPUTING WHAT IS REASONABLE IN CHARGING RATES THAT WILL EARN A RETURN UPON THE INVESTMENT. This means that *some* bonds and *some* interest on bonds and *some* floating debt and *some* uncollectible debts due the company ought to be considered. Counsel leaves out of his calculation *all* interest and *all* bonds and *all* of the floating debt and *all* uncollectible debts. Let us put them and the uncollectible debts in and see what they produce when added to the admissions of counsel in his brief (page 5):

Admitted running expenses (real, $13,000)	$6,000 00
Admitted taxes (real, $2,500 to $5,000)	2,500 00
Admitted wear and tear (real, $9,000)	2,500 00
Interest (6 per cent.) on floating debt (say, $10,000)	600 00
Some annual payment to sinking fund (say) ...	2,000 00
Some payment of 5 per cent. interest on some bonds (say, $50,000)	2,500 00
Some cancellation of floating debt	2,000 00
Some loss in bad debts, 10 per cent, (real, 20 per cent.)	3,100 00
	$21,200 00

See the result! Counsel admits, in his brief (page 5), that, under the ordinance the company's income (he terms it *net* income) would be $13,000 per annum. He will not, however, count the items of *some* interest on *some* float-

ing debt or *some* payment to the sinking fund or *some* payment of interest on *some* bonds (say as small an issue of bonds as $50,000) or *some* annual cancellation of the floating debt or *some* loss by bad debts. We repeat, that the cases everywhere only forbid OVER-CAPITALIZATION and OVER-BONDING as a basis of computing reasonable rates. Therefore, *some* capitalization and *some* bonds are allowable. In the above table we only calculate on, say, $50,000 of bonds, and on, say, a payment annually to the sinking fund of $2,000, and of a cancellation of, say, $2,000 of the floating debt each year. We reduce things to an absurdity.

We show by the above table that the total yearly outgo of the company, on a basis that is so reasonable that it is almost absurd, is *$21,200*. We show, however, in our original brief (page 44), by *undisputed evidence*, that the *real* outgo per annum is *$30,700*. We are arguing the matter under the admissions of opposing counsel in his brief (page 5). He says that the annual running expenses are *$6,000*. *He guesses at this!* The only evidence in the case that ought to be entertained on this matter is that of Mr. McGonigale, who testified that the annual operating expenses are *$13,000*. Mr. McGonigale is the secretary and treasurer of the company. He testified as to *actual existing facts* with the books of the company before him. Opposing counsel *guesses* at wear and tear as amounting to about $2,500. Mr. McGonigale says that the books of the company show this to be actually *$9,000* per annum. Opposing counsel places the annual taxes at *$2,500*, but Mr. McGonigale says that they *actually* range from *$2,500* to *$5,000*. Mr. McGonigale says that there is a yearly loss to the company of *$6,200* in uncollectible debts. Opposing counsel ignores this item. When we place it in the above table we cut it in two in order to make a concession for the sake of argu-

ment. It is an *actual fact* that there are over *$200,000* of bonds, but in the above table, for the sake of argument, we calculate interest on but *$50,000* of bonds. It is an *actual fact* that the floating debt of the company is over *$19,000*, but in the above table we show a cancellation of that debt by a payment of *$2,000* per annum upon it. Opposing counsel will not consider the floating debt or the interest on that debt or the sinking fund or the interest on the bonds, or the loss by bad and uncollectible debts. When we come to consider these things in our above table, we reduce them, for the sake of argument, to the smallest possible figure or estimate that will harmonize with anything like reason. We get the result of *$21,200* as the yearly outgo or expense of the company. Opposing counsel says that the *present* income of the company is *$30,000* a year (brief, page 5). He says that the ordinance will reduce the part of this income which comes from the private consumers *($22,600)* by *30 per cent.* Calculation shows that *30 per cent.* of *$22,600* is *$6,780.* Subtract *$6,780* from *$22,600* and the result is *$15,820*, which is the amount received from private consumers when the ordinance is in force, according to the arguments of opposing counsel. If we add *$15,820* to the amount received from the city for fire protection *($7,400)*, we get the gross income of the company under the ordinance, according to arguments of counsel, which is *$23,220.* We have shown above that, by the most absurd concessions, the total outgo of the company is *$21,200.* We see that, under the ordinance, its income will be only *$23,200.* This leaves as a net profit only *$2,020*, which is about *2 per cent.* upon the *admitted* value of the plant.

Of course this line of reasoning is based entirely on statements and figures set by brief of opposing counsel, to which our added items of expense, which ought reasonably to be taken into consideration, are attached. THE

GIST OF THE WHOLE MATTER IS, THAT OPPOSING COUNSEL HAS RECKONED WITHOUT HIS HOST, IN ATTEMPTING TO GUESS AT THE YEARLY EXPENSE OF THE COMPANY, AND HE HAS LEFT OUT MANY THINGS WHICH GO TO MAKE UP THE LEGITIMATE EXPENSES OF THE COMPANY. WHEN THE RECKONING IS PROPERLY TAKEN, AND ALL THINGS ARE PROPERLY INCLUDED, THE EXPENSES OF THE COMPANY, BY THE ADMISSIONS IN COUNSEL'S BRIEF, NEARLY EQUAL ITS INCOME. WHEN WE TAKE INTO CONSIDERATION THE EVIDENCE OF MR. M'GONIGALE AND THE FACTS, AS SHOWN BY THE BOOKS OF THE COMPANY, FREE FROM ANY GUESSWORK, THE EXPENSES OF THE COMPANY MORE THAN EXCEED ITS INCOME.

Respectfully submitted,

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